tractual obligations for the Trustee to assume or reject.

If, as petitioner argues, the bankruptcy constituted an anticipatory breach of its agreement with the bankrupt, petitioner was not compelled or required to continue its performance thereunder. There is no proof whatever that it was requested or required by anyone to so continue. Having elected to continue performance, then as the Court of Appeals held, it must continue such performance on the contract terms, because the breach did not permit it to make a new contract without the bankrupt's consent. The fact, however, is that petitioner had completed performance prior to the bailor's bankruptcy (fol. 64).

The Court of Appeals did no more than reaffirm a well established principle of New Jersey Law and apply the same to the facts appearing herein.

II

The decision of the Court of Appeals is not in conflict with the decision of another Circuit Court of Appeals on the same matter.

The determination of the court below relates solely to a question of New Jersey law even though the principle enunciated therein may have acceptance outside that state and is in accord with the pronouncement of other states. As we have pointed out *infra,* the question presented to the court below was whether the extension of credit by a bailee for hire constituted a waiver of its common law lien on the property of the bailor in its possession. The effect of bankruptcy upon executory contracts was not here involved. Petitioner's attempt to establish a conflict with decisions in other circuits which relate solely to the effect of bankruptcy upon executory contracts is inapposite,

without merit and inadequate as a basis for the granting of its petition for a writ of certiorari. Nonetheless no conflict exists between the holdings in the cases cited by petitioner and that of the court below. The facts in the cited cases are clearly distinguishable from those here.

In *Greif Bros. Cooperage Co.* v. *Mullinix*, 264 Fed. 391, the *Trustee, with the consent and approval of the court, ratified and affirmed the agreement between the bankrupt and Greif Bros.* (Italics ours.) The Circuit Court correctly held that since the Trustee and the court had accepted the benefits of the Greif company's performance, the Trustee was estopped from denying his and the bankrupt estate's liability to bear the burdens of the performance of the contract according to its terms. In the case at bar there had been no affirmance or acceptance by the Trustee of the bankrupt's agreement with the petitioner; indeed such acceptance and affirmance was impossible because petitioner completed its work before the bailor's bankruptcy, and a Trustee was not appointed until June 30, 1949, several months after such completion. Petitioner's reference to undisputed testimony that at the time of the filing of the petition the goods were "somewheres in process; and a great many of them were finished" is not correct because immediately preceding the answer referred to we find (fol. 64):

> "Q. Now, at the time of the filing of the petition did you have on hand in the form of cut goods the remainder of the goods that had been previously shipped to you for processing? A. *Not in the form of cut goods. In the form of made up goods.*" (Italics ours.)

In *Heyward* v. *Goldsmith*, 269 Fed. 946, the court was concerned with the proving of a claim against the bank-

rupt estate. No question as to the lien of a bailee for hire was involved. It enunciated the principle that an adjudication in bankruptcy is the equivalent of an anticipatory breach of an executory agreement. This in no way conflicts with the determination of the court below which accepted that principle when it said:

> "But, even if we assume that the bailor's breach of contract would have justified the bailee in refusing to go on, he did not repudiate the contract; * * * "

However, petitioner did not, by reason of the bankruptcy proceeding, repudiate its contract with the bankrupt but on the contrary elected to continue its performance thereunder. We question that any further performance was required because we believe the facts establish that performance was completed before the institution of the arrangement proceeding. Even if performance continued after the institution of such proceeding, it was not at the request or with the consent or approval of the Trustee or of the court, and it was a purely voluntary act on petitioner's part.

Nor may the Trustee be deemed to have affirmed petitioner's contract with the bankrupt by accepting the benefits of petitioner's continued performance. The inescapable conclusion is that if petitioner voluntarily continued performance after the bankruptcy, it was for the purpose of enhancing the value of the goods in its possession in the mistaken view that it was thus acquiring greater protection of the bankrupt's debt to it.

The other cases cited by petitioner, *Rosenblum* v. *Uber*, 256 Fed. 584, and *City Bank Farmers Trust Co.* v. *Irving Trust Co.*, 299 U. S. 433, are also inapplicable. They relate to landlord's claims against bankrupt estates and there

is nothing whatever in either of these cases from which an analogy might conceivably be drawn to warrant their citation here. The questions for determination in these cases are concisely stated as follows. In *Rosenblum* v. *Uber, supra,* the Circuit Court said (p. 590):

> "This subject matter, so far as it is relevant to the issues of this case, is, landlords and tenants, and rents payable to one by the other."

In the *City Bank Farmers Trust Co.* v. *Irving Trust Co., supra,* this Court said (p. 443):

> "The question for decision in this case is whether the claim recognized by §77B, which would not have been an enforceable demand at common law, or under the laws of many of the states, is allowable only if the leasehold estate has not, after rejection of the lease, been drowned by surrender effective under state law or otherwise terminated pursuant to state law by the lessor's conduct."

We submit that there is no conflict between the determination sought to be reviewed with decisions in other circuits on the same subject.

III

The determination sought to be reviewed is not in conflict with applicable local decisions.

All of petitioner's arguments are based upon an interpretation of the decision of the court below which is without any legal or factual foundation. As we have already demonstrated, its argument is replete with misstatements

of fact and misconstruction of the relatively simple principle of law enunciated by the court below which is:

> "* * * if the contract of bailment provides for redelivery before payment is due, no lien arises because it is apparent that the bailee has extended credit and has not relied upon the existence of a lien to secure payment."

As an instance of this, petitioner, in its attempt to establish a conflict with local decisions, quotes a sentence from *DuPont* v. *United Zinc Co.*, 85 N. J. L. 416. It infers thereby that the principle cited by the court below from *Blackburn* v. *Reilly*, 47 N. J. L. 290, has been changed by statute. Such is not the fact. The statute referred to is the Sale of Goods Act now known as "New Jersey Statutes Annotated Property Title 46, Section 46; 30-51" which applies only to "a contract to sell goods to be delivered by stated installments." The change, if any, made by the statute, concerns the question of release of one party to a contract upon the other's breach thereof. The rule in *Blackburn* v. *Reilly* is that release is effective if the conduct of the party in default evinces an intention to abandon the contract or a design no longer to be bound by its terms. The test specified in the statute is that "it depends in each case upon the terms of the contract and the circumstances of the case, whether the breach of contract is so material as to justify the injured party in refusing to proceed further." At best, any change brought by the statute would be limited to the type of contract specified therein. *Blackburn* v. *Reilly*, decided by the highest court in New Jersey, has continued to be and still is the law of that state. It has been cited with approval and followed in the most recent cases on the subject. *Vine* v. *Robert W. Kennedy Co.*, 2 N. J. Misc. 777 (1924) and

Dun & Bradstreet v. *Wilsonite Products,* 130 N. J. L. 24, (1943). It appears that *DuPont* v. *United Zinc Co.* decided by a lower court, stands alone on its own facts.

Even if it be assumed that *Blackburn* v. *Reilly* was no longer the law of New Jersey, no conflict would exist between the determination of the court below and applicable local decisions. The Court of Appeals' reference to *Blackburn* v. *Reilly* was incidental to its decision and was not determinative thereof. Whether petitioner, by reason of the bankruptcy, was or was not released from performing its part of the contract is of no moment, because, as was said by the court below, it did not repudiate the contract but continued performance, and neither the breach nor the bailor's bankruptcy permitted it to make a new contract without the bankrupt's consent. Petitioner's argument is devoid of any reference to this principle or to the supporting authorities cited by the court below.

The basic question presented here was whether petitioner had a lien on the bankrupt's goods in its possession either under common law or by statute and the extent of such lien, whether general or specific. Since the work was performed in New Jersey the law of that State as to liens was controlling. If the bailor's subsequent bankruptcy constituted a breach of the contract, this in no way affected the waiver by petitioner of any lien which it might have had.

The holding of the court below with respect to petitioner's waiver of lien in no way conflicts with the applicable decisions of the New Jersey Courts. Petitioner has failed to cite any contrary decisions of the courts of that state. As in its argument to the court below, petitioner discusses at length *Stone* v. *Allied Clothing Corporation,* 140 N. J. Eq. 244 but still fails to establish its inapplica-

bility to the present case. From its discussion of that case we gather that petitioner seeks a reversal of the holding therein, for which purpose its petition for a writ of certiorari serves no function.

Petitioner urges that by the decision of the court below it is, in fact, told that because it extended one week's credit to the bankrupt it must lose not only payment for that week's work but must also sacrifice its right to payment for work thereafter done *for which it extended no credit.* (Italics ours.) Petitioner's conclusion is erroneous because by its contract with the bankrupt it extended credit for *all* work to be performed for the bankrupt. Moreover, as the court below held, it could not by reason of the bankruptcy change its contract with the bankrupt. That is the law of New Jersey and petitioner's argument is completely silent with respect thereto. It has made no attempt whatever to show any conflict between the New Jersey cases and the decision of the court below on this principle, and none exists. Neither does the lower court's treatment of any of the collateral principles of law discussed by it conflict with applicable local decisions.

CONCLUSION

Petitioner has failed to establish any basis for the granting of its petition for a writ of certiorari and it is respectfully requested that the same be denied.

Respectfully submitted,

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